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IN THE

Supreme Court of the United States

OCTOBER TERM, 1906.

No. 245

THE MERCANTILE TRUST COMPANY,
PLAINTIFF IN ERROR,

vs.

MELVILLE D. HENSEY.

Brief on Behalf of Plaintiff in Error

HAYDEN JOHNSON,
JOHN RIDOUT,
For Plaintiff in Error.

IN THE

Supreme Court of the United States.

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vs.

MELVILLE D. HENSEY.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

Statement of Case.

This case comes to this court upon a writ of error to the Court of Appeals of the District of Columbia. The action, which was originally instituted in the Supreme Court of the District of Columbia, is one of covenant on a bond for $50,000, and was brought by Melville D. Hensey against the Mercantile Trust Company. The declaration contains two counts. To the first count the plea is *non est factum;* to the second count, performance,

set off, and accord and satisfaction. The facts out of which the action arose are as follows: On January 24, 1900, Melville D. Hensey was the owner of fifteen partially constructed houses on Washington Heights, in the District of Columbia. The Tullock estate was the owner of six other houses of the same character, also partially constructed, and located in the same subdivision. By previous contractual relations between Seymour W. Tulloch, acting for the Tulloch estate, and Hensey, the latter was obliged to complete the five Tulloch houses. On January 24, 1900, Hensey entered into a contract with William S. Jones, a builder, for the completion of the entire twenty-one houses for a stated consideration of $89,250 (Rec., p. 27). To insure the performance by Jones of this contract, he gave to Hensey a bond in the penalty of $50,000, and at the same time Hensey gave a bond to Seymour W. Tulloch to insure the completion of the five Tulloch houses. Upon both these bonds the plaintiff in error, the Mercantile Trust Company, became surety. The building contract between Hensey and Jones required that the twenty-one buildings be completed—

> "agreeably to the drawings and specifications made by Melville D. Hensey, architect, and which plans and specifications are signed by the said parties hereto and hereunto annexed, within the time aforesaid, in a good workmanlike and substantial manner, *to the satisfaction and under the direction of Bates Warren, or the architect placed in charge by him, to be testified by writing or certificate under the hand of Bates Warren, or the architect placed in charge by him*" (Rec., p. 29).

The specifications, which are made a part of the building contract, commence:

> "Specifications for material to be furnished and labor to be performed in the erection and completion of twenty-one residences * * * for Mr. Melville D. Hensey; to be built according to plans and elevations, and detailed drawings, and these specifications prepared by M. D. Hensey, architect, *but under the supervision of an architect to be appointed by Bates Warren, said architect appointed to take entire charge*" (Rec., p. 29).

Specifications further recite:

> "In all cases of doubt as to the meaning of the drawings, reference is to be made *to the architect in charge, whose decision will be final*" (Rec., p. 29).

On the same day, January 24, 1900, Hensey conveyed fifteen houses, the title of which had been taken by him, to Mr. Bates Warren, as his trustee, to be held by the said Bates Warren upon certain uses and trusts for the benefit of Hensey's creditors.

Jones entered upon the performance of his contract, but on account of financial difficulties was unable to continue the work and finally abandoned it. The Trust Company as bondsman, thereupon, in recognition of its obligation upon the bond, took up the work and completed the houses. Prior to April 19, 1901, Warren had not exercised his right to appoint an architect to take charge of the construction, but exercised a general supervision of the work himself. On April 19, 1901, he addressed the following letter to William J. Palmer, a local architect:

"DEAR SIR: I am required by the specifications for the houses being erected on Washington Heights by the Mercantile Trust Company for Messrs. Tulloch *et. al.*, to designate and appoint an architect to be in charge of the construction of said houses. And pursuant to such requirement I hereby designate and appoint you as such architect and request that you forthwith, if agreeable to you, take charge of same. Before doing so, however, you must make some arrangement as to your compensation therefor, as I will in no way be responsible for such charges as you may make for superintending the construction of the houses, and this letter is written only for the purpose of indicating my choice of the architect to be in charge. If you conclude to accept this appointment please advise me of the same at your earliest convenience. I would suggest that you call upon the representative of the Mercantile Trust Company, Mr. Percy H. Russell, to make arrangements for your compensation above referred to.

Very truly,

BATES WARREN."

Palmer immediately assumed control and on July 29, 1901, gave the following certificate to Warren:

"BATES WARREN, Esq., Washington, D. C.

"DEAR SIR: It gives me pleasure to report to you the completion of the twenty-one Kellogg houses on Vernon, California, Kalorama, and Belmont avenues by the Mercantile Trust Company of Pittsburg. *The work has been done according to my interpretations of the plans and specifications*, and where deviations have been made from the plans and specifications it has been where the same were

inconsistent and ambiguous. In all cases of inconsistency and ambiguity, the work has been done according to the interpretation most beneficial to the houses.

"Very truly yours,

"WILLIAM J. PALMER."

Hensey, through lack of funds, neglected to pay the Mercantile Trust Company the balance due on the Jones contract, and when the houses were finally completed, July 29, 1901, there was a conceded balance due from Hensey to the Trust Company of $29,032, which in the trial court was allowed by the court and set off against his demand. When the houses were completed, the fifteen owned by Hensey, the title to which, however, was held by Bates Warren, his trustee, were sold out under deeds of trust on account of Hensey's inability to meet the interest on the notes (Rec., p. 30). The Mercantile Trust Company, notwithstanding Hensey's refusal to pay to it the balance due on the Jones contract, at an expense to itself of over $40,000, completed the houses in the manner indicated by the architect's certificate just recited. After the completion of the houses by the Trust Company and their sale at auction through Hensey's default, Hensey, with a conceded balance of $29,032 still due to the Trust Company on account of the Jones contract and interest paid for him by the Trust Company on account of the deeds of trust upon the said property, brought suit against the Trust Company for $50,000 on its bond; this action was founded upon a theory of Hensey's that the work was

not in every respect as required by the plans and specifications, and further that he was entitled to $50 a day as penalty for every day's delay beyond the time limited by the contract for the completion of the houses. This penalty, as he estimated it, amounted to something over $16,000.

At the trial of the case in the Supreme Court of the District of Columbia, the plaintiff offered several witnesses who testified that by reason of *omissions*, *structural defects* and *defective materials* used in the construction, the houses were worth from $2,000 to $3,000 apiece less than what they would have been worth had the requirements of the specifications, as he interpreted them, been complied with. This testimony was objected to by the defendant on the ground, among others, that the only recovery on the part of the plaintiff could be for *omissions*, and not for *structural defects* and *defective materials* used, the latter two items being controlled by the architect's decision in the matter. No separate estimate was given by any witness as to the decrease in value of the houses as the result of omissions alone or of structural defects or defective materials alone. The trial court, although it ruled that only *omissions* could be recovered for, nevertheless permitted testimony of the entire damage caused the plaintiff by reason of all of the alleged defects.

Other defenses interposed by the Trust Company at the trial were performance and set off. There was no evidence offered by the plaintiff in support of the issue presented by the first count of the declaration. There was a general verdict for the plaintiff for $8,468. The

judgment upon that verdict was affirmed by the Court of Appeals of the District of Columbia, and the case is now here for review upon writ of error to that court.

Assignments of Error.

The plaintiff in error assigns, as reversible error, the following:

I. That the trial court erred in refusing to grant the first instruction submitted by the defendant below, which is as follows:

> "The jury are instructed that upon all the evidence in this action, the plaintiff is not entitled to recover any damages against the defendant by reason of any structural defects claimed to exist in reference to the houses referred to in this action. and in respect of this claim their verdict should be for the defendant" (Rec., p. 33).

II. That the trial court erred in admitting the testimony of the plaintiff below to the effect that the difference in value of the said houses by reason of *omissions*, *structural defects* and *defective materials* was from $2,000 to $3,000 less on each house than it would have been had they been completed according to the contract, plans and specifications as interpreted by the plaintiff (Rec., p. 29).

III. That the trial court erred in admitting the testimony of the witness George C. Hough respecting the total cost of taking out the alleged defective work in the said houses and making them conform to his interpretation of the plans and specifications (Rec., p. 30).

IV. That the trial court erred in sustaining the plaintiff's demurrer to the defendant's further rejoinder (Rec., p. 22).

V. That the trial court erred in refusing to grant the defendant's second prayer, which is as follows:

> "The jury are instructed that the certificate of William J. Palmer accepting the houses, made the subject of this litigation, is conclusive of their completion according to the terms of the contract, and they are, therefore, not to consider any structural defects claimed to exist therein, and in this respect their verdict should be in favor of the defendant" (Rec., p. 33).

ARGUMENT.

From the statement of the case and the assignments of error, it will be observed that the two contentions presented on behalf of the plaintiff in error are:

First, that the testimony of all the plaintiff's witnesses who testified in respect of deficiencies in construction being as to the total damage sustained by the plaintiff as the result of *structural defects*, *defective materials* and *omissions*, and the trial court having ruled that the jury should consider *omissions* alone, there was no basis upon which the jury could segregate damages caused by *defective materials* and damages caused by *omissions* so as to reach a verdict in accordance with the court's rulings.

Second, that under the building agreement, the architect's certificate of completion should have been held to

be final and conclusive of such completion, there being no evidence of fraud or bad faith on his part. These propositions will be considered in order.

I. No basis furnished by the testimony upon which the jury, under the instructions given them by the court could have estimated damages.

It is submitted that it is apparent, upon an inspection of the record, that upon all the testimony in the case, and the rulings of the trial court in respect of the law applicable to such testimony, there was left to the jury absolutely no basis upon which to estimate the damage sustained by the plaintiff, if any, growing out of the defects assigned by him in his specification of breaches.

All the witnesses who were produced by the plaintiff testified, in proof of the damage sustained by the plaintiff, that the difference in the value of the houses by reason of the *omissions*, *structural defects* and *defective materials* was from $2,000 to $3,000 less on each house than it would have been had they been completed according to the witness's interpretation of the contract, plans, and specifications. (Rec., p. 29). No witness was interrogated in respect of the difference in the value of the houses by reason of omissions alone. No witness undertook to segregate the items assigned as breaches, and give the damage arising from each alleged defect. All the witnesses testified simply as to the total diminution in value as the result of the three items, viz., *omissions*, *structural defects* and *defective materials*.

Now the trial court granted the 12th prayer of the defendant, which is as follows:

> "The jury are instructed that in considering the question of structural defects, *they are not at liberty to consider anything but omissions*, if any they find, and *are not* entitled to consider *substitutions of materials* or *modifications of construction* made with the approval of the architect under his interpretation of the plans and specifications." (Rec., p. 35).

It will further be observed that the architect, William J. Palmer, on July 29th, 1901, addressed the following certificate to Bates Warren, Esq., the trustee of Mr. Hensey:

> "DEAR SIR:—It gives me pleasure to report to you the completion of the twenty-one Kellogg houses on Vernon, California, Kalorama and Belmont avenues, by the Mercantile Trust Company of Pittsburg. *The work has been done according to my interpretation of the plans and specifications*, and where deviations have been made from the plans and specification, it has been where the same were inconsistent and ambiguous, and, in cases of inconsistency and ambiguity, the work has been done according to the interpretation most beneficial to the houses."

In commenting upon the twelfth prayer above recited the trial court, after reading the prayer, said (Rec., p. 35):

> "That is to say, gentlemen, putting it in another way, that under this contract an architect was chosen, and the contract provided that wherever

there is any doubtful construction to be given as between the drawings and specifications, if there happens to be any antagonism between the two, and if it cannot be readily seen what it means, then the architect was to decide finally upon the question, and his decision was final in the premises, unless you find that he acted in bad faith or was so negligent in his duty as to amount to bad faith in the premises. Wherever there was any doubtful question arising about the drawings and specifications then the architect's duty was to decide, and his decision was final and binding on all the parties to this cause."

From the foregoing it must be readily seen that under the rulings of the court the case was submitted to the jury for them to assess damages only for omissions, if any they should find, and that they were expressly instructed not to assess damages for *substitutions of material* or *modification of construction* made with the approval of the architect under his interpretation of the plans and specifications. This necessarily requires, in view of the testimony of the architect, that what "*substitutions of material* and *modifications of construction* were made were made with his approval and according to his interpretation of the plans and specifications, that the jury segregate the damage arising from *omissions* from the damages resulting from *substitutions of material* and *modifications of construction*. Unless from the testimony they can do this, the charge given them in the twelfth prayer, and its explanation by the court, becomes idle and useless. And yet all the testimony in the case, as far as the money

estimate for damage is concerned, lumps *omission*, *structural defects* and *defective materials*, and furnishes no basis whatever upon which they can be segregated. Even though *all* of the substitution of materials and modifications of construction were not made with the consent of the architect, it is conceded that some of them were, so this segregation is none the less essential in giving the jury a basis upon which to assess damages. All the evidence in the case upon this point, as shown by the bill of exceptions, is that recited at pp. 29–30 of the Record, and is as follows:

> "The plaintiff further gave evidence by several other witnesses, over the objection and exception of the defendant duly reserved, tending to prove that the said buildings were not completed until after August 24, 1901, and that the same were not completed according to said plans and specifications in the particulars set forth in the assignments of breaches; and that the difference in value of the said houses by reason of *omissions*, *structural defects* and *defective materials* was from $2,000 to $3,000 less on each house than it would have been had they been completed according to the contract, plans and specifications.
>
> "Thereupon the counsel for plaintiff called as a witness Mr. George C. Hough and among other things the witness was asked with great detail as to items, *whether the work provided for by the drawings and specifications had been done in accordance therewith*, to which question counsel for the defendant objected on the ground that the architect was exclusively clothed with authority to decide such questions, but the court overruled the objection and

allowed the witness to answer, to which ruling counsel for defendant excepted.

"Thereupon the witness testified in much detail that the work in many respects failed to meet these requirements.

"He was then asked and over objection and exception duly reserved, allowed to answer as follows:

"What would it have been fairly worth to take out *the defective work*, so far as it was possible to do so without taking the houses down, and make the houses conform to that extent to the plans and specifications.

"Answer: '*$2,000 for each house.*'

"Thereupon the plaintiff over defendant's objection and exception duly reserved, in his own behalf, gave testimony tending to prove that in the erection of the said houses there were omissions of work and materials required by the plans and specifications, *and that inferior materials were substituted for specified materials, and that the workmanship was in many respects below the requirements of said contract and specifications;* and further that the houses were not completed until after August 24, 1901, and that for these reasons the full amount of $89,250 was not paid to said Jones or the defendant, and that $8,630, and notes aggregating $21,000, parts of the contract price, were not paid by him, and that the mantels mentioned in the contract were never supplied by him."

The propriety of the trial court in granting the twelfth prayer of the defendant, which instructed the jury which items in the assignment of breaches to consider and which not to consider, is certainly immaterial to the issues here presented. That prayer was granted and the

jury were required to take it into account in connection with the rest of the charge and the testimony taken before them. It seems perfectly clear that this testimony was not sufficiently complete to enable them to follow that instruction of the court.

II. The Architect's Certificate Conclusive.

1. It must be remembered that Bates Warren held the title to the houses in question as trustee for Hensey and Hensey's creditors (Rec., p. 30). He was in privity only with Hensey and the Hensey interests, and stood in no relation whatever with Jones or Jones' bondsman. Hensey demanded by his contract with Jones that Jones perform his work "*to the satisfaction and under the direction of Bates Warren or the architect placed in charge by him*" (Rec. p. 27). Neither Jones nor the Trust Company had any voice in the selection of this representative or in the selection of the architect. It was their duty to do the work, subject to the limitations of the plans and specifications, to his satisfaction, whoever he was. The question then is, did they do it? Bates Warren, Hensey's trustee, was in charge of the work from the date of the contract, January 24, 1900, until he saw fit to appoint an architect, which was April 19, 1901. William J. Palmer, the architect appointed by Warren, was in charge of the work from April 19, 1901, until the work was finished. There was no suggestion at the trial, nor is there in the record, that Warren ever found fault with a single detail of the work while he was in charge. In appointing Palmer the architect, as the work was near-

ing completion, he no doubt appointed the man he and his *cestui que trust* (Hensey) thought would best protect the Hensey interests. There is not the slightest suggestion, nor a single fact, from which an inference could be drawn that either Warren or Palmer, during the periods of their respective supervision, acted otherwise than in the best of good faith, and with a sincere desire to protect and promote the interests of their principal, Palmer, when the work was finished, voluntarily sent Warren the following letter:

"*January 29, 1901.*

BATES WARREN, Esq.,
Washington, D. C.

DEAR SIR: It gives me pleasure to report to you the completion of the twenty-one Kellogg houses on Vernon, California, Kalorama, and Belmont avenues, by the Mercantile Trust Company, of Pittsburg. The work has been done according to my interpretation of the plans and specifications, and where deviations have been made from the plans and specifications, it has been where the same were inconsistent and ambiguous, and in all cases of inconsistency or ambiguity, the work has been done according to the interpretation most beneficial to the houses.

Yours very truly,

WILLIAM J. PALMER."

If Warren's business engagements were such as to prevent his frequent visits to the property so that to Hensey "apparently one Frank H. Knight, a foreman employed by the defendant, was in charge until the appointment of Mr. W. J. Palmer, an architect, in April,

1901," it certainly cannot militate against the defendant. The Trust Company had neither the means of compelling the constant attendance of Warren upon the work nor compelling the exercise of his privilege of appointing an architect. The company had to have a foreman, and it is not strange that he appeared to be in charge of the work. The fact that Hensey wrote captious letters in the nature of self-serving declarations to the company during the progress of the work should, it is submitted, be the subject of no consideration. Every one realizes that it is utterly impossible to perform any branch of work in any department to the satisfaction of every one. Jones did not contract to do the work under Hensey's directions, but under the direction and to the satisfaction of his trustee, Bates Warren, or an architect to be selected by Bates Warren, and Jones' bondsman at an enormous expense to itself, completed the work to the satisfaction of both.

Stress seems to be laid upon the cross-examination of Palmer, in which he gives his estimate of the duties his appointment imposed upon him. He says that he "had nothing to do with the work which was already done, and was only to supervise the completion of the work. Apart from the question how his misconception could prejudice the rights of the Trust Company, which was working in good faith under his supervision, it is submitted that the record shows that there was no misconception. By the terms of the building contract under which the buildings were being constructed, Warren was the sole supervisor and referee up to the

time of the appointment of Palmer. It is not pretended that there could be any other construction of the contract. It would be preposterous to contend that the Trust Company, after almost entirely completing the buildings under the supervision of Warren, could be compelled by Palmer upon his appointment to replace or alter the work Warren had sanctioned. But a discussion of this subject is needless, because Palmer in his certificate (Rec., p. 31) attests to the entire completion of the houses according to the plans and specifications.

Taking into consideration that there is not one word in the record from which fraud or bad faith on the part of either Warren or Palmer could be inferred, it is believed that they, having been made the arbitrators by Hensey as to the proper construction of the work, and the Trust Company having acted under their directions, their decision is final and binding upon Hensey.

The law upon the subject is entirely settled.

In Boettler vs. Fendick, 73 Texas, 494 (5 L. R. A., 270), which was a case involving a building contract nearly resembling the one at bar, it was said:

> "In an action under such a contract for the improper construction of the building, evidence by witnesses that the work was not done in a workmanlike manner is inadmissible where there is no evidence of fraud or collusion on the part of the architect and he has given the certificate required by the contract as to the character of the work."

There is also in the L. R. A. report of this case a note citing numerous authorities in support of it.

Crane Elevator Co. *vs.* Clark, 80 Fed. Rep., 705:

"When a contractor has undertaken to do certain work to the satisfaction of an architect, the determination of the architect, so constituted an umpire, is final and conclusive and can be impeached *only for fraud, collusion, or such gross mistake as implies bad faith.*"

Sheffield, etc., Railway Co. *vs.* Gordon, 151 U. S., 285:

"When a contract provides that work done under it shall be examined by a superintendent every two weeks, and if done to his satisfaction it shall be a final acceptance by the other party, so far as done, the acceptance by the superintendent forecloses that party from thereafter claiming that the contract had not been performed according to its terms."

Martinsburg, etc., R. R. Co. *vs.* March, 114 U. S., 548:

"A contract for the construction of a railroad provides that the companies' engineer should, in all cases, determine questions relating to its execution, including the quantity of the several kinds of work to be done and the compensation earned by the contracts at the rates specified; that his estimates should be final and conclusive; and that 'whenever the contract shall be completely performed on the part of the contractor and the said engineer shall certify the same in writing, under his hand, together with his estimate aforesaid, the said company shall, within thirty days after the receipt of said certificate, pay to the said contractor, in current notes, the sum which, according to their contract, shall be due.' Held, that in the absence

of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, the action of the engineer in the premises was conclusive upon the parties."

Chicago, etc., R. R. Co. *vs.* Price, 138 U. S., 188:

"When a contract with a railway company for construction work provided for monthly payments to the contractor, 'on the certificate of the engineer should be conclusive on the parties as to quantities and amounts, and when, in executing the contract each monthly account as made up by the division engineer was sent to the chief engineer and the monthly payments were made on the certificate of the latter officer, his action in making such certificate was held to be a 'determination' under the contract, conclusive upon the parties in an action at law, in the absence of fraud or of such gross error as to imply bad faith."

Sweeney *vs.* U. S., 109 U. S., 618:

"When a contract with the United States for building a wall provides that payment for the work contracted for shall not be made until an agent, to be designated by the United States, certifies that it is in all respects as contracted for, and after completion of work the designated agent refuses to give the certificate, and there is no fraud, nor such gross mistake as would necessarily imply bad faith, nor failure to exercise honest judgment on the part of the agent, the engineer's certificate is a condition precedent to payment."

See, also—

Kihlbery *vs.* U. S., 97 U. S., 398.

Rose's notes to Sweeney *vs.* U. S., Vol. 10, page 372.

2. At the trial below it was urged by the appellees that a further provision of the building contract under consideration destroyed the conclusiveness of the architect's certificate. That provision is as follows (Rec., p. 28): That the owner shall pay to the contractor the sum of—

> "$89,250, to be paid to the said party of the second part (the contractor) as the work progresses and in the manner and at the time set out in the schedule of payments hereto annexed and signed by the parties hereto and made a part of this agreement. Provided, that in each of the said cases a certificate shall be obtained from and signed by the architect in charge, that the contractor is entitled to payment; said certificate, however, in no way lessening the total and final responsibility of the contractor. Neither shall it exempt the contractor from liability to replace the work, if it be afterwards discovered to have been done ill, or not according to the drawings and specifications, either in execution or materials."

This paragraph, it is confidently submitted, can by no construction have the effect claimed for it by the appellee. The object of its insertion is entirely obvious. It first provides that the contract price shall be paid the contractor as the work advances, in instalments as set out in an annexed schedule. The next sentence, which is inserted in every building contract, is to justify the owner in paying an instalment to his contractor which the contractor claims to be due, without conclusively admitting that all the work up to that stage has been

done. For instance, the contractor makes demand for his "second floor joist" payment. It might well be that in a number of small details the work has not reached the stage contemplated by that payment, or it might be that certain work already done will have to be done over. Now, if the contractor is refused this payment until all these objections are remedied, it might, if the contractor has no capital behind him, cause a cessation of the work altogether. But with a provision similar to the one just quoted the owner can pay the contractor the instalment demanded and at the same time not waive any defects up to that time. The provision has reference to certificates for payments and nothing more. It can certainly have no application where the architect appointed by the owner or his trustee finally and conclusively accepts the work *upon its entire completion*, and certifies that it has been done "according to my interpretation of the plans and specifications" (Rec., p. 31), especially with a provision in the contract (Rec., p. 29) "that in all cases of dispute as to the meaning of the drawings, reference is to be made to the architect in charge, *whose decision will be final.*"

This construction gives effect to both provisions in the contract, and has, it is believed, never before been questioned. The judgment of Palmer at the time, which was four years after he gave his certificate, was the same as when the certificate was given. The paragraph in question would never mean that after completion with satisfaction of the architect the owner could still come forward and have his independent whims and theories of construction humored at the expense of the contractor.

The learned court below, in its opinion (Rec., p. 43) reaches the conclusion that, although the contract says that the work should be done "to the satisfaction and under the direction of Bates Warren, or the architect placed in charge by him," it is not clear that the architect's decision that the work has been done to his satisfaction is to be final and conclusive. The opinion says, that the contract "does not say that his (the architect's) decision that the work has been done to his satisfaction is to be final and conclusive." If the architect's conclusion that the work has been done to his satisfaction is not conclusive of the work having been so done, is it not pertinent to inquire whose opinion could be? Could Hensey be permitted to show that the work was not done to the satisfaction of the architect, when the architect has said that it was? Yet, this is the ruling of the court below. If the contract says the work is to be done to the satisfaction of the architect, and the architect says that it has been done to his satisfaction, could anything be more final and conclusive? Hensey might show that the work has not been done to his satisfaction ; and Hensey's witnesses might testify that the work has not been done to their satisfaction; but that was not the contract that the Trust Company undertook. They undertook to do the work to the satisfaction of Bates Warren, or the architect to be appointed by him, and the testimony is conclusive that they did it. If they had followed their own judgment upon the work, or that of Hensey and his witnesses, the result might have been different ;

but it would not have been what the Trust Company contracted it should be, which was to see that the work was performed to the satisfaction of Bates Warren or his architect.

It is respectfully submitted, for the reasons urged, that the record discloses error, for which the judgment of the court below should be reversed.

HAYDEN JOHNSON,
JOHN RIDOUT,
For Plaintiff in Error.